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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE CATHY ANN BENCIVENGO)

UNITED STATES OF AMERICA,) Case No. 12CR3617-CAB

Plaintiff,

V.

ISAAC SYMEON BRAGG,

Defendant.

I.

STATEMENT OF FACTS¹

The government has charged Mr. Bragg in a two count indictment with Sex Trafficking of a Minor, and Sexual Exploitation of a Minor, in violation of 18 U.S.C. §§ 1591, 2251. Mr. Bragg has entered a not guilty plea to the indictment. In essence, the government alleges that in 2010, Mr. Bragg posted explicit photographs of a 17-year old girl on BackPage.com, for prostitution.

A) 2010 Investigation, Arrest, and Search

San Diego Detective James C. Hunter began an investigation against

¹ Unless otherwise stated, the “facts” referenced in these papers come from government-produced discovery that the defense continues to investigate. Mr. Bragg does not admit the accuracy of this information and reserves the right to challenge it at any time.

1 Mr. Bragg on April 26, 2010. According to his report, he began the investigation
2 because:

3 On April 26, 2010 I received information that 30 y/o BRAGG was in
4 possession of 17 y/o Dezaree and her five month old baby, Jordan.
5 Considering BRAGG was on parole and had multiple priors for pimping I
initiated an investigation.

6 Detective Hunter met with Dezaree's mother who believed that Dezaree was working
7 as a prostitute and had found pictures of Dezaree posted on Backpage.com. The
8 photos were posted under the name "Sara," and Dezaree's cell phone number was
9 listed. Dezaree's bank account showed 13 debits to Backpage.com. Dezaree's mother
10 claimed that she had been a runaway and was with Mr. Bragg on the dates that the
debits were made to Backpage.com, and that she had seen Dezaree with Mr. Bragg.

11 Detectives surveilled Mr. Bragg, and on May 6, 2010, allegedly saw him
12 intimately kissing Dezaree, the 17 year old girl. He was arrested for two violations
13 of parole: driving a motor vehicle; and for associating with a person known to be a
14 prostitute. According to the report, he was arrested at about 7:55 pm.

15 Agent Hunter did a Cellbrite forensics download of a cell phone, alleged
16 to be Mr. Bragg's phone, on May 6, 2010, at about 11:30 pm. There is no evidence
17 of a warrant being issued for this forensics download of the phone. The Cellbrite
18 analysis downloaded the contacts and photographs from the phone. It did not
19 successfully download the text messages that were stored on the phone. Agent
20 Hunter reviewed and transcribed each of the text messages on the phone after the
21 Cellbrite download.

22 **B) July 9, 2011 Alleged Statements**

23 Two San Diego detectives, Det. Michael Rand and Det. Moore
24 interviewed Mr. Bragg while he was in San Diego Central jail on July 9, 2011, while
25 investigating a different case against a woman believed to have stabbed a man two
26 days before. Mr. Bragg has not been provided with a recording of this interview, but
27 there is a summary by Det. Rand in his report of investigation. The summary of the
interview is as follows:

1 On 07-09-11, Det. Moore and I went to San Diego Central Jail in order
2 to interview Bragg to see if he knew anything about the girl in the photo.
3 I explained to Bragg that based on the information provided by Det.
4 Hunter it showed that he had placed the ad for the female suspect.
5 Bragg denied having anything to do with placing the ad and said he did
6 not know who the girl was. Bragg told me that his e-mail address;
7 blackmagicmoney70@yahoo.com, is commonly used by several other
8 people and that any one of those people could have placed the ad. He
9 also said that everyone knows where he lives and could have put his
10 address in where required for the ad. Ultimately, Bragg admitted to
providing friends of his with his access information for backpage.com
but refused to identify any of those people.

7 The government has not provided any further information about this interview,
8 including whether Mr. Bragg was given Miranda warnings before being questioned,
9 whether he was given an opportunity to contact his lawyer before being questioned,
10 or whether the detective contacted his lawyer before questioning him.

11 **C) August 1, 2012 Statements**

12 Agents Tim Read and John Donaher interrogated Mr. Bragg on August
13 1, 2012, when Mr. Bragg reported to his state parole officer. Transcript of
14 interrogation attached as Exhibit A. He was interrogated in a room at the parole
15 office, in the middle of his parole meeting.

16 Agents Read and Donaher invented a story as a pretense for questioning
17 Mr. Bragg. They told Mr. Bragg that they received a call that morning of a kidnaping
18 in Mexico, and that they needed his help to find the woman who had been kidnaped
19 and find out if the report was a hoax. There was no report of a kidnaping. The agents
20 kept up this cover story throughout the entire interrogation and never told Mr. Bragg
21 that it was a cover story for interrogating him.

22 Although Mr. Bragg had been charged with a serious crime and was
23 actually being interrogated in investigation of that crime, the agents did not tell Mr.
24 Bragg that he was charged with a crime until the very end of the interrogation, when
25 they claimed to have suddenly found a warrant for him, and claimed not to know what
26 the warrant was for. Ex. A, 23-29. Throughout the entire interrogation, the agents
27 told Mr. Bragg that he was not under arrest, and that they were only questioning him
28 to get help with the kidnaping report. When Agent Read introduced himself, he told

1 Mr. Bragg that "we're not trying to spook or scare you or anything crazy like that, but
2 we had something come up and we think you might be able to help us out." Ex. A,
3 1. Then, while explaining the supposed kidnaping report, Agent Read told Mr. Bragg
4 "we don't think you have anything to do with any of this stuff, we just want to know
5 what you know about this particular gal so we can try to help her family out help try
6 to figure out where she's at." Ex. A, 2. They continued, throughout the entire
7 interrogation, telling Mr. Bragg that they were only asking him questions to find the
8 girl, and that they did not think he had anything to do with the situation.

9 Although the agents knew that Mr. Bragg would be going straight from
10 their interrogation to federal jail, they repeatedly told Mr. Bragg that he would be
11 going home after he answered their questions. At the very beginning of the
12 interrogation, Agent Read told Mr. Bragg that they were there for a "couple of
13 things," and that he could "go test afterwards" -- referring the urinalysis drug test that
14 Mr. Bragg had to take as part of his meeting with his parole officer. Ex. A, 1.
15 Before reading Mr. Bragg his Miranda rights, Agent Read told him that they "just
16 want to ask you a couple of quick questions and get out of here so that you can go on
17 and do whatever you normally do here and get out of the way here." Ex. A, 1. The
18 agents never told Mr. Bragg that he was under arrest and going to jail until the very
19 end of the interrogation -- throughout the interrogation they repeatedly said and
20 implied that he would be released after he answered their questions.

21 Although Agent Donaher read Mr. Bragg his Miranda rights, the agents
22 did as much as possible to undercut and trivialize those rights. They told Mr. Bragg
23 that they were reading him his rights because his "probation" officer told them
24 had to. Ex. A, 2. Agent Read told Mr. Bragg that the "probation guy said we gotta
25 read your rights," and that "it doesn't make any difference, I'm sure you have had that
26 read to you a whole bunch of times before." Ex. A, 2. Then, just before Agent
27 Donaher began reading the rights, Agent Read told Mr. Bragg that the Miranda rights
28 are "just their policy stuff." Ex. A, 3. After reading Mr. Bragg the rights, Agent

Donaher asked Mr. Bragg "so do you waive those rights? Just talk to us? I mean if you have nothing to do with this than that's cool." Ex. A, 3. Mr. Bragg told the agents that he had nothing to do with the kidnaping. Ex. A, 3. Though Mr. Bragg did not explicitly waive his rights, he began answering the questions posed by the agents pursuant to this supposed kidnaping investigation -- while the agents assured him the questioning had nothing to do with him, and they were just trying to investigate this kidnaping report.

Once the agents told Mr. Bragg that there was a warrant for his arrest, he asked repeatedly what the warrant was for and why he was being arrested. The agents told Mr. Bragg the statute number under which he was charged but refused to tell him what the statute was for. Ex. A, 23-27. At that time, Mr. Bragg asked for an attorney. Ex. A, 26.

II.
MOTION TO SUPPRESS STATEMENTS

Mr. Bragg moves to suppress the two sets of statements that the government has provided discovery on: statements he allegedly made on July 9, 2011 to San Diego Detectives Moore and Rand; and statements he made on August 1, 2012 to Agents Read and Donaher. He moves to suppress these statements under both voluntariness and Miranda grounds.

**The Government Must Prove That Mr. Bragg Was Given Adequate
Miranda Warnings Before Any Custodial Interrogation And That He
Made A Voluntary, Knowing, And Intelligent Waiver Of Those
Rights.**

The Supreme Court has held that the government may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. See Miranda-Arizona, 384 U.S. 436, 444 (1966). Custodial interrogation is questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. at 477. In Stansbury v. California, the Supreme Court clarified its prior decisions by stating that "the initial determination of custody

depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." 511 U.S. 318, 323 (1994). The Ninth Circuit has held that a suspect will be found to be in custody if the actions of the interrogating officers and the surrounding circumstances constrained the suspect's freedom of movement in such a way that a reasonable person in that situation would not have felt free to leave. See United States v. Basher, 629 F.3d 1161, 1166 (9th Cir. 2011).

Once a person is in custody, Miranda warnings must be given prior to any interrogation. An interrogation is not necessarily direct questioning by law enforcement. Rather, an interrogation happens when law enforcement knows or should know that their statements or actions are reasonably likely to elicit an incriminating response from the suspect. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Miranda warnings must advise the defendant of each of his or her "critical" rights. See United States v. Bland, 908 F.2d 471, 473 (9th Cir. 1990). The warnings must clearly convey these critical rights and the agents may not undercut or contradict the purpose behind Miranda. See Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011) (en banc). Furthermore, if a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease immediately. See Miranda, 384 U.S. at 473-74; see also Edwards v. Arizona, 451 U.S. 477, 482 (1981).

For a defendant's statements to be admitted into evidence, the defendant's "waiver of Miranda rights [during custodial interrogation] must be voluntary, knowing and intelligent." United States v. Binder, 769 F.2d 595, 599 (9th Cir. 1985) (citing Miranda, 384 U.S. at 479), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) (en banc); see also United States v. Vallejo, 237 F.3d 1008, 1014 (9th Cir. 2001); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). When interrogation continues in the absence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination and his

right to counsel. See Miranda, 384 U.S. at 475. In fact, the Ninth Circuit has held that "[t]here is a presumption against waiver." United States v. Garibay, 143 F.3d 534, 536-37 (9th Cir. 1998) (citing United States v. Bernard S., 795 F.2d 749, 752 (9th Cir. 1986)) (other internal citations omitted); see also United States v. Heldt, 645 F.2d 1275, 1277 (9th Cir. 1984) (stating that the court must indulge ever reasonable presumption against waiver of fundamental constitutional rights) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, age, experience, and conduct of the accused. See Edwards, 451 U.S. at 482. A determination of the voluntary nature of a waiver "is equivalent to the voluntariness inquiry [under] the [Fifth] Amendment." Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990).

A determination of whether a waiver is knowing and intelligent, on the other hand, requires a reviewing court to discern whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id.; see also United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000); Garibay, 143 F.3d at 536. This inquiry requires that a court determine whether "the requisite level of comprehension" existed before upholding the purported waiver. Derrick, 924 F.2d at 820. Thus, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal *both* an uncoerced choice *and* the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (citations omitted).

1) The July 9, 2011 Statements Violated Miranda, Because There is No Evidence That Mr. Bragg Was Given His Miranda Warnings Or Waived His Rights.

Mr. Bragg was clearly in custody when he was questioned on July 9, 2011, by San Diego Detectives Rand and Moore -- he was in San Diego Central Jail. Although we do not know the exact questions that were asked, there was clearly interrogation -- the detectives interviewed Mr. Bragg "to see if he knew anything

1 about the girl in the photo." The government has provided no evidence that any
 2 Miranda warnings were given to Mr. Bragg, and thus they have not met their burden
 3 under Miranda. There is likewise no evidence that Mr. Bragg waived his rights under
 4 Miranda, so those statements may not be used against him in trial.

5 2) The August 1, 2012 Statements Violated Miranda, Because The Agents
Undercut And Contradicted The *Miranda* Warnings.

7 "The Miranda warning is intended to ensure that all persons taken into
 8 custody are first made aware of their rights before being interrogated by the
 9 Government. *It is imperative that this procedure is taken seriously.*" United States
 10 v. San Juan-Cruz, 314 F.3d 384, 389 (9th Cir. 2002) (emphasis added). Agents here
 11 did not take the Miranda warning procedure seriously. Just before Agent Donaher
 12 read Mr. Bragg his Miranda rights, Agent Read told Mr. Bragg that the Miranda
 13 warnings are "just their policy stuff." Agent Donaher told Mr. Bragg that they had
 14 to read him his rights because the "probation officer" said they had to. Agent
 15 Donaher told Mr. Bragg that the "probation guy said we gotta read your rights and
 16 stuff before we talk if that's cool with you. *It doesn't make any difference*, I'm sure
 17 you have had that read to you a whole bunch of times before."

18 Where law enforcement downplays the significance of the Miranda rights
 19 like they did here, the Miranda warning is not sufficient. In Doody, the Ninth Circuit
 20 reviewed the state appellate court's decision under the strict AEDPA standard, and
 21 found that the Miranda warnings given in that case were so insufficient that the state
 22 court's decision upholding the introduction of the statements was clearly contrary to
 23 the law. Doody, 649 F.3d at 991. Among the problems with the Miranda warnings
 24 as stated by the police officers was that the detective "began by informing [the
 25 juvenile defendant] that the warnings were merely a formality that [he] should not
 26 take out of context." Id.

27 Agents Read and Donaher told Mr. Bragg that the Miranda warnings were
 28 just "policy stuff," said that they were only reading the rights because the probation

"guy" said to, and told Mr. Bragg that the Miranda rights don't make any difference. "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Miranda, at 476. The agents's comments here reduced Mr. Bragg's Miranda rights to less than a preliminary ritual. No Miranda warnings can be effective in this context, with these comments.

2) The August 1, 2012 Statements Violated *Miranda* Because Mr. Bragg Could Not Have Made A Knowing, Voluntary, or Intelligent Waiver Of His Rights Because The Agents Questioned Him When He Reported For Parole And Lied To Him About The Purpose Of The Questioning.

Because of the way that the agents questioned Mr. Bragg, the government

cannot meet their burden of proving that Mr. Bragg made a knowing, voluntary, and intelligent waiver of his Miranda rights.

First, they interrogated him when he reported to his parole officer, taking advantage of the unique relationship between a parolee and his parole agent. As a parolee, Mr. Bragg was subject to conditions of parole that are not imposed on a person not on parole -- including following all of his parole agent's instructions. Mr. Bragg's failure to follow his parole agent's instructions could lead to a return to prison. The role of a parole agent to his parolee is thus particularly coercive. Agents Read and Donaher exploited this coercive relationship by interrogating Mr. Bragg when he reported to his parole agent. They did not take any curative steps to make clear that he was not required to meet with the agents for his parole. Instead, they took affirmative steps to link their interrogation with his parole meeting -- including interrogating him at the parole officer when he reported, interrogating him before he took his drug test, and repeatedly referring to his drug test and that he would be taking the drug test after the interrogation. Other than the fact that the parole agent was not the one doing the questioning, there were no steps taken to separate this interrogation from his parole meeting. No one explained to Mr. Bragg that even though he was in the middle of a meeting with his parole agent, his rules on parole did not apply to this particular set of questioning. No waiver could be knowing or

1 voluntary in light of this kind of coercion -- where Mr. Bragg was at a parole meeting,
 2 and under a condition of parole that he has to follow his parole agent's instructions
 3 or be returned to prison.

4 Also, the agents' made-up story about a kidnaping to trick Mr. Bragg into
 5 waiving his Miranda rights and answering their questions prevented Mr. Bragg from
 6 making a knowing, intelligent, and voluntary waiver of his rights. They did
 7 everything they could to make it seem like Mr. Bragg was *not* being charged with a
 8 crime, and to make it seem like waiving his Miranda rights was just a formality.

9 The agents continuously said that Mr. Bragg would be released after he
 10 answered their questions -- something they knew was a lie. At the very beginning of
 11 the interrogation, Agent Read told Mr. Bragg that he was there for a "couple of
 12 things," and that he would be able to "go test afterwards" -- referring to the urinalysis
 13 drug test that Mr. Bragg had to take as a condition of his parole. Ex. A, 1. He told
 14 Mr. Bragg that they just wanted to ask a "couple of quick questions" and then "get
 15 you out of here so that you can go on and do whatever you normally do here and get
 16 out of the way here." Ex. A, 1. Later in the interrogation Agent Read again told
 17 Mr. Bragg that "all we need, we need your help," Ex. A, 8, and continued to tell
 18 Mr. Bragg that "this doesn't have anything to do with you." Ex. A, 11.

19 The agents framed all their questions as if there really was a kidnaping
 20 report, and they were asking Mr. Bragg questions to investigate the kidnaping.
 21 Almost everything they told Mr. Bragg was a lie, clearly designed to trick him into
 22 answering questions that they apparently thought he would not answer if not tricked
 23 in this way. The government cannot prove that Mr. Bragg made a knowing and
 24 intelligent waiver of his Miranda rights where he did not even know that he was being
 25 charged with a crime, and the agents said that he was being questioned solely to help
 26 them find a missing person.

27 **B) The Government Must Prove That Mr. Bragg's Statements Were**
 28 **Voluntary.** Even when Miranda's procedural safeguards have been satisfied, a

1 defendant in a criminal case is deprived of due process of law if his conviction is
 2 founded upon an involuntary confession. See Arizona v. Fulminante, 499 U.S. 279
 3 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the
 4 burden of proving -- by a preponderance of the evidence -- that a confession is
 5 voluntary. See Lego v. Twomey, 404 U.S. 477, 483-84 (1972). A voluntary
 6 statement must be the product of a rational intellect and free will. See Blackburn v.
 7 Alabama, 361 U.S. 199, 208 (1960). In determining the voluntariness of a
 8 confession, the Ninth Circuit has required consideration of "whether, under the
 9 totality of the circumstances, the challenged confession was obtained in a manner
 10 compatible with the requirements of the Constitution." United States v. Bautista-
 11 Avila, 6 F.3d 1360, 1364 (9th Cir. 1993) (citations omitted); see also Schneckloth-
 12 v. Bustamonte, 412 U.S. 218, 226 (1973). In general, a statement is considered
 13 involuntary if it is "extracted by any sort of threats or violence, [or] obtained by any
 14 direct or implied promises, however slight, [or] by the exertion of any improper
 15 influence." Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curium) (quoting Bram v.
 16 United States, 168 U.S. 532, 542-43 (1897).

17 1. The August 1, 2012 Statements Were Not Voluntary Because the Agents
Exerted Improper Influence by Lying to Mr. Bragg About the Purpose of
the Interrogation and by Interrogating Him When He Reported to His
Parole Officer.

20 The government cannot meet its burden of showing that any statements
 21 made on August 1, 2012 were voluntary for the same reasons that it cannot meet its
 22 burden of showing that Mr. Bragg's waiver of his Miranda rights were knowing,
 23 voluntary, and intelligent. The agents exerted improper influence over Mr. Bragg, in
 24 violation of Hutto, by making up a story that they needed him to answer their
 25 questions because a woman's life may be in danger. And, the agents exerted improper
 26 influence over Mr. Bragg by interrogating him in the middle of his meeting with his
 27 parole agent, and exploiting the fact that Mr. Bragg could face prison time for
 28 disobeying his parole agent's instructions.

1 2. This Court Should Hold An Evidentiary Hearing.

2 This Court should conduct an evidentiary hearing to determine whether
 3 Mr. Bragg's statements should be admitted into evidence. Under 18 U.S.C. § 3501(a),
 4 this Court is required to determine, outside the presence of the jury, whether any
 5 statements made by Mr. Bragg are voluntary. In addition, 18 U.S.C. §3501(b)
 6 requires this Court to consider various enumerated factors, including Mr. Bragg's
 7 understanding of his rights and of the charges against him.

8 Additionally, § 3501(a) requires this Court to make a factual
 9 determination. If a factual determination is required, courts must make factual
 10 findings by Fed. R. Crim. P. 12. See United States v. Prieto-Villa, 910 F.2d 601, 606-
 11 10 (9th Cir. 1990). Since "'suppression hearings are often as important as the trial
 12 itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these
 13 findings should be supported by evidence, not merely an unsubstantiated recitation
 14 of purported evidence in the government's pleading.

15 III.
 16 **MOTION TO SUPPRESS THE ILLEGAL CELL PHONE SEARCH AND**
 17 **ALL THE FRUITS OF THAT SEARCH**

17 The Fourth Amendment protects individuals against unreasonable searches and
 18 seizures. U.S. Const. Amend. IV. A warrantless search is "per se unreasonable . . .
 19 subject only to a few specifically established and well-delineated exceptions."
 20 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted). The
 21 government bears the burden of establishing that a warrantless search was reasonable,
 22 i.e., that it falls within an exception and was conducted reasonably, and did not
 23 violate the Fourth Amendment. United States v. Carbajal, 956 F.2d 924, 930 (9th Cir.
 24 1992) (citations omitted).

24 A) **The Search Was Not Valid Under The Search-Incident-To-Arrest**
 25 **Exception To The Warrant Requirement.**

26 The government may argue that the search of the data in the cell phone was
 27 lawful as a search incident to arrest. The search was not lawful under the search-
 28 incident-to-arrest exception to the warrant requirement because this exception does

1 not apply to searching the data held in cell phones, and even if it did the search of the
 2 cell phone data took place three and a half hours after Mr. Bragg was arrested --
 3 which is too long of a delay for the exception to apply.

4 1) As A Rule, The Search-Incident-To-Arrest Exception To The Warrant
 Requirement Should Not Apply To Cell Phones.

5 The search-incident-to-arrest exception allows law enforcement to
 6 conduct a warrantless search incident to a person's arrest in order to protect officers
 7 from weapons or other things that could be used against the officers by the arrested
 8 person, and to prevent the loss or destruction of evidence. See Arizona v. Gant, 556
 9 U.S. 332, 338 (2009). However, [i]f there is no possibility that an arrestee could
 10 reach into the area that law enforcement officers seek to search, both justifications for
 11 the search-incident-to-arrest exception are absent and the rule does not apply." Id.
 12 at 339. Thus, the search-incident-to-arrest exception may apply to seizing a cell
 13 phone from an arrestee's possession so that an arrestee does not smash the phone or
 14 use it as a weapon, but it cannot justify searching the *contents* of a cell phone. As a
 15 rule, the search-incident-to-arrest exception should not apply to a search of the
 16 contents of a cell phone.

17 2) Even If The Search-Incident-To-Arrest Exception To The Warrant
 Requirement Applied To Cell Phones, The Over Three Hour Delay
 Before This Search Makes This Search Not "Incident" To Mr. Bragg's
 Arrest.

18 According to Detective Hunter's report, he arrested Mr. Bragg just before 8:00
 19 p.m. on May 6, 2010. He conducted a Cellebrite forensics download on the cell
 20 phone about three and a half hours later. The Cellebrite phone examination report
 21 states that the extraction state date/time was "05/06/10 23:30:40," and that it ended
 22 at "05/06/10 23:33:10." Thus, the search was at about 11:30 pm, a little over three
 23 and a half hours after Mr. Bragg's arrest just before 8:00 pm.

24 To be "truly incidental to arrest," the search must be "'roughly
 25 contemporaneous with the arrest.'" United States v. Caseres, 533 F.3d 1064, 1073
 26 (9th Cir. 2008) (quoting United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004)
 27 (per curiam)). In Hudson, the Court explained that "[c]oncerning the temporal scope
 28

1 of the search, we have held that a 'search incident to arrest' must be conducted 'at
 2 "about the same time as the arrest.'"" United States v. Hudson, 100 F.3d 1409, 1419
 3 (9th Cir. 1996) (quoting United States v. Turner, 926 F.2d 883 (9th Cir. 1991), and
 4 United States v. Andersson, 813 F.2d 1450, 1456 (9th Cir. 1987)).

5 A delay of three and a half hours is not "roughly contemporaneous to arrest."
 6 Courts, including the United States Supreme Court and Ninth Circuit, have declined
 7 to apply this exception in cases where shorter periods of time elapsed from arrest to
 8 warrantless search. See e.g., United States v. Chadwick, 433 U.S. 1, 15-16 (1977)
 9 (overruled on other grounds, California v. Acevedo, 500 U.S. 565 (1991)) (holding
 10 that 1 hour delay between arrest and search of already seized footlocker too long to
 11 be incident to arrest); United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987)
 12 (holding that 30 to 45 minute delay between arrest and search too long to be incident
 13 to arrest, despite defendant still being present at arrest scene); United States v.
 14 Gibson, No. 11-00734, 2012 WL 1123146, *10 (N.D.Cal. April 3, 2012) (holding that
 15 a 1 to 2 hour delay between arrest and search of a cell phone was too long to be
 16 incident to arrest).

17 The search here did not occur "contemporaneously with the arrest," Vasey, 834
 18 F.2d at 786, and the Court should not "transform the search incident to arrest
 19 exception into a search *following* arrest exception." Id. at 788 (emphasis in original).
 20 Even if the Court finds that the search-incident-to-arrest exception can apply to a
 21 search of the data in a cell phone, this search was too delayed to qualify under this
 22 exception.

23 **B) The Search Was Not Valid Under The Exception To The**
Warrant Requirement For California Parolees.

24 The government may argue that the search of the cell phone was lawful under
 25 the exception to the warrant requirement that applies to some California parolees.
 26 This exception, often inaccurately called a "fourth waiver," is often included in the
 27 conditions of release given to parolees when they are released from prison, and states
 28 that "you and your residence and any property under your control may be searched

1 without a warrant by an agent of the Department of Corrections or any law
2 enforcement officer." See Cal. Penal Code § 3067(a). Like all exceptions to the
3 warrant requirement, the government bears the burden of establishing that such a
4 condition applied to Mr. Bragg. See United States v. Caseres, 533 F.3d 1064 (9th
5 Cir. 2008). However, even if the government is able to establish that Mr. Bragg was
6 properly subject to this condition, the search of the cell phone in this case exceeded
7 the permissible scope of the exception and was invalid.

8 The Supreme Court addressed, and upheld, this exception to the warrant
9 requirement in three important cases: Griffin v. Wisconsin, 483 U.S. 868 (1987);
10 United States v. Knights, 534 U.S. 112 (2001); and Samson v. California, 547 U.S.
11 843 (2006). Both Griffin and Knights dealt with people on state probation, and
12 Samson dealt with a person on parole. They held that probationers and parolees have
13 diminished expectations of privacy than a person not under supervision, because they
14 are on a "continuum of state-imposed punishments." See Samson, 547 U.S. at 850
15 (internal citations omitted). However, "restrictions on a parolee's liberty are not
16 unqualified." Id. at 850 fn 1. And, the law does not "equate parolees with prisoners
17 for the purpose of concluding that parolees, like prisoners, have no Fourth
18 Amendment rights." Samson, 547 US. at 850 fn 2. See also Griffin, 483 U.S. at 875
19 (holding that supervision is a special need of the state that "permits[s] a degree of
20 infringement upon privacy that would not be constitutional if applied to the public at
21 large. *That permissible degree is not unlimited, however[.]*" (emphasis added)).
22 Thus, although the Supreme Court has upheld certain warrantless searches pursuant
23 to conditions of parole or probation, the Court also made clear that these kinds of
24 conditions do not *eliminate* Fourth Amendment protection.

25 In each of these cases, the Supreme Court considered a warrantless search
26 regarding a probationer or parolee under the standard reasonableness analysis, which
27 applies a totality of the circumstances approach to the determine whether a search is
28 reasonable under the Fourth Amendment. See Samson, 547 U.S at 848. "Whether

1 a search is reasonable is determined by assessing, on the one hand, the degree to
 2 which it intrudes upon an individual's privacy and, on the other, the degree to which
 3 it is needed for the promotion of legitimate governmental interests." Id. (internal
 4 citations omitted).

5 Applying this test, in each case the Court found the warrantless searches
 6 reasonable under the Fourth Amendment on the basis of the state's substantial interest
 7 in closely supervising people on probation or parole. In Knights, the Supreme Court
 8 found that a warrantless search condition of probation served two substantial state
 9 interests -- rehabilitation of the probationer, and protecting society from future
 10 criminal violations. Knights, 534 U.S. at 119. Similarly, Griffin found that the need
 11 to closely supervise probationers and parolees was a special need, explaining that the
 12 courts have "permitted exceptions [to the warrant requirement] when special needs,
 13 beyond the normal need for law enforcement, make the warrant and probable-cause
 14 requirement impracticable." Griffin, 483 U.S. at 873. The special need of closely
 15 monitoring probationers was to "assure that the probation serves as a period of
 16 genuine rehabilitation and that the community is not harmed by the probationer's
 17 being at large." Id. at 875.

18 Each case noted that imposing a warrant requirement would undermine the
 19 state's substantial interest in closely monitoring probationers and parolees. In Griffin,
 20 the Court noted that:

21 A warrant requirement would interfere to an appreciable degree with the
 22 probation system, setting up a magistrate rather than the probation officer
 23 as the judge of how close a supervision the probationer requires.
 24 Moreover, the delay inherent in obtaining a warrant would make it more
 difficult for probation officials to respond quickly to evidence of
 misconduct, and would reduce the deterrent effect that the possibility of
 expeditious searches would otherwise create[.]

25 Griffin, 483 U.S. at 876 (internal citations omitted). In Knight, the Court concluded
 26 that "'the very assumption of the institution of probation' is that the probationer 'is
 27 more likely than the ordinary citizen to violate the law.'" Knights, 534 U.S. at 120,
 28 citing to Griffin, 483 U.S. at 880. From there, it held that

probations have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.

Knights, 534 U.S. at 120. In Samson, the Court noted that requiring reasonable suspicion to conduct warrantless searches of parolees would "undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders," particularly because the state of California has such high numbers of parolees and has a high recidivism rate. Samson, 547 U.S. at 854.

Griffin, Knights, and Samson dealt with searches that were conducted by a law enforcement officer to determine whether the person was in compliance with their conditions of supervision -- including not violating the law. None of the cases dealt with a search that was conducted *after* the probationer or parolee was arrested and back in custody.

Here, the cell phone was searched about three and a half hours after Mr. Bragg was arrested and taken into custody for violating his conditions of parole. The state's substantial interest in closely monitoring Mr. Bragg's compliance with parole and supervising him ended when he was arrested and taken into custody for violating parole. The search of the data on the cell phone cannot be justified as a "special need" that excuses the failure to obtain a warrant, because once Mr. Bragg was in custody, any special need to monitor his compliance with parole had ended, and the only purpose of the search was to collect evidence. Once he was in custody, the search of the cell phone was squarely within the "normal need for law enforcement" that is not enough to justify a special needs exception under Griffin. 483 U.S. 873. The investigation and prevention of crimes is not a special governmental interest that can excuse the warrant requirement. See United States v. Scott, 450 F.3d 863, 870 (9th Cir. 2006) ("Crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.")

"The touchstone of the Fourth Amendment is reasonableness." Samson, 547

1 U.S. at 855 fn 4. This Court must determine whether there was a substantial
2 governmental interest in conducting a warrantless search that outweighs the privacy
3 interests in the data in a cell phone. See id. at 848. Here, there was no substantial
4 governmental interest that would have been harmed by obtaining a warrant before
5 searching the cell phone in this case. The factors that made the warrantless searches
6 reasonable in Griffin, Knights, and Samson do not apply here because at the time of
7 the search Mr. Bragg was already in custody and the phone was in the exclusive
8 control of the state. Mr. Bragg was not "at large" to harm the community as was a
9 concern in Griffin. 483 U.S. at 875. There was no longer a concern with the
10 deterrent effect of an expeditious search, as was another concern in Griffin. Id. at
11 876. There could not have been concern that Mr. Bragg had a heightened incentive
12 to destroy evidence, as was a concern in Knights, because the cell phone was already
13 in the exclusive control of the detective when it was searched. 534 U.S. at 120.

14 On the other side, privacy interests in a cell phone are great. The capabilities
15 of cellular telephones today make them readily analogizable to a computer. The
16 Ninth Circuit has held a defendant has a legitimate, objectively reasonable
17 expectation of privacy in a personal computer. United States v. Heckenkamp, 482
18 F.3d 1142, 1146 (9th Cir. 2007); see also United States v. Ziegler, 474 F.3d 1184,
19 1189-90 (9th Cir. 2007) (holding that an employee had a reasonable expectation of
20 privacy in a computer in a locked office despite a company policy that computer
21 usage would be monitored). Government-based publications acknowledge this
22 similarity. "Smartphones, or mobile phones with advanced capabilities like those of
23 personal computers (PCs), are appearing in more people's pockets, purses, and
24 briefcase." Paul Riggiero & Jon Foote, United States Computer Emergency Readiness
25 Team, U.S. Dep't of Homeland Security, Cyber Threats to Mobile Phones, available
26 at http://www.us-cert.gov/reading_room/cyber_threats_to_mobile_phones.pdf (last
27 visited January 17, 2012).

28 A district court in the Northern District of California recently encountered an

almost-identical situation. United States v. Gibson, 2012 WL 1123146 (N.D. Cal. Apr. 3, 2012). There, the defendant was subject to a similar search condition while on probation in California, and law enforcement conducted a warrantless search of his house pursuant to that condition, which led to the finding of a gun and thus probable cause that the defendant was a felon in possession of a firearm. The defendant was arrested, and about 1-2 hours later law enforcement searched his phone. The court suppressed the search of the cell phone for violating the Fourth Amendment.

In this case, weighing the lack of any substantial governmental interest in searching the phone without a warrant against the substantial privacy interests in the data in a cell phone leads to only one conclusion: the warrantless search of the cell phone, where the cell phone was in the exclusive control of the state, and where Mr. Bragg was already in custody and no longer being supervised on the street, was unreasonable.

IV.

**MOTION TO DISMISS COUNT ONE OF THE INDICTMENT BECAUSE
THE STATUTE AND MANNER UNDER WHICH MR. BRAGG IS
CHARGED DOES NOT GIVE ADEQUATE NOTICE TO A PERSON
SIMILARLY SITUATED TO MR. BRAGG THAT HE IS IN VIOLATION
OF A CRIMINAL STATUTE AND THUS IS UNCONSTITUTIONAL**

The central question to be answered when determining whether 18 U.S.C. § 1591(a) and (b) is unconstitutional as applied to Mr. Bragg is whether the statute and circumstances of how the statute is applied provides sufficient notice to make Mr. Bragg aware that he was engaged in criminal behavior. United States v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001)(the resolution of this void-for-vagueness challenge turns on whether the language of [a statute] puts a defendant on notice that his conduct was criminal.). A criminal statute must be sufficiently clear to allow an ordinary person to understand its meaning. Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973). A criminal statute violates the Due Process Clause and is void for vagueness if it “fails to give persons of ordinary intelligence fair notice that their contemplated conduct is proscribed.” Fantasy Book Shop, Inc. v. City of Boston, 652

1 F.2d 1115, 1122-23 n. 9 (1st Cir. 1981); Marty's Adult World v. Town of Enfield, 20
 2 F. 3d. 512, 516 (2nd Cir., 1994); United States v. Ocegueda, 564 F. 2d 1363, 1365
 3 (9th Cir. 1977).

4 The doctrine of vagueness clearly exists to defend due process interests. Where
 5 a law as applied to an individual is vague, it impermissibly delegates basic policy
 6 matters to policemen, juries, and judges for resolution on a subjective basis. Such a
 7 basis brings with it the danger or arbitrary and discriminatory application. See
 8 Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). When the law is vague,
 9 as it is as applied here, it does not give a person sufficient notice or description to
 10 allow a person to bring his actions into compliance with the law, nor does it allow a
 11 jury or a court to determine who is fairly in violation of the law and who is not. It has
 12 long been the Supreme Court practice, however, before striking a federal statute as
 13 impermissibly vague, to consider whether the prescription is amenable to a limiting
 14 construction. See Skilling v. U.S., 130 S.Ct. 2896 (2010); Hooper v. California, 155
 15 U.S. 648, 657 (1895) (“The elementary rule is that *every reasonable construction*
 16 must be resorted to, in order to save a statute from unconstitutionality.”) (emphasis
 17 added). See also Boos v. Barry, 485 U.S. 312, 330-331 (1988); Schneider v. Smith,
 18 390 U.S. 17, 26(1968). The Supreme Court has accordingly instructed “the federal
 19 courts ... to avoid constitutional difficulties by [adopting a limiting interpretation] if
 20 such a construction is fairly possible.” Boos, 485 U.S., at 331, 108 S.Ct. 1157; see
 21 United States v. Harriss, 347 U.S. 612, 618, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (“[I]f
 22 the general class of offenses to which the statute is directed is plainly within its terms,
 23 the statute will not be struck down as vague And if this general class of offenses
 24 can be made constitutionally definite by a reasonable construction of the statute, this
 25 Court is under a duty to give the statute that construction.”). Here, this court must
 26 strike any application of 1591(c) as unconstitutionally vague as to save the
 27 constitutionality of 1591 in general.

28 Section 1591(a) states whoever knowingly:

1 (1) in or affecting interstate or foreign commerce []recruits,
 2 entices, harbors, transports, provides, obtains, or maintains by any
 3 means a person; or

4 (2) benefits financially or by receiving anything of value, from
 5 participation in a venture which as engaged in an act described in
 6 violation of paragraph (1), knowing, or in reckless disregard of the fact,
 7 that means of force, threats of force, fraud, coercion [], or any
 8 combination of such means will be sued to cause the person to engage
 9 in a commercial sex act, or that the person has not attained the age of
 10 18 year and will be caused to engage in a commercial sex act, shall be
 11 punished.

12 The government has charged Mr. Bragg with knowingly recruiting, enticing,
 13 harboring, transporting, providing, obtaining, and maintaining by any means Minor
 14 Female #1, knowing and in reckless disregard of the fact that Minor Female #1 would
 15 be caused to engage in a commercial sex act, having had a reasonable opportunity to
 16 observe Minor Female #1 and knowing and in reckless disregard of the fact that
 17 Minor Female #1 had not attained the age of 18 years.

18 Pursuant to § 1591 (a), the government has to prove that Mr. Bragg knew or
 19 was in reckless disregard of the fact that the Minor Female alleged in the indictment
 20 had not attained the age of 18 years. However, by adding the language "having had
 21 a reasonable opportunity to observe the Minor Female # 1," the government seems
 22 to be triggering another subsection of § 1591, although it has not specifically
 23 indicated so in the indictment. According to § 1591(c) "In a prosecution under
 24 subsection (a)(1) in which the defendant had a reasonable opportunity to observe the
 25 person so recruited, enticed, harbored, transported, provided, obtained or maintained,
 26 the **government need not prove that the defendant knew that the person had not
 attained the age of 18 years.**" (emphasis added). If by adding the language
 "reasonable opportunity to observe Minor Female," the government is attempting to
 include subsection (c) of 1591 to count one, then Mr. Bragg requests this court to
 strike that language from the indictment because "reasonable opportunity to observe"
 is undefined and unconstitutionally vague.

27 The inquiry turns on how a person of normal intelligence is supposed to
 28 interpret the term "reasonable opportunity to observe" and whether there is sufficient

1 notice or description to allow that person to bring his actions into compliance with
2 the law. Grayned, 408 U.S. at 108-109. There is a lack of guidance in the law about
3 how a possible defendant, law enforcement, or juror is to interpret "reasonable
4 opportunity to observe" in terms of length of exposure, type and intensity of
5 acquaintance, and what is the criterial level of curiosity or inquisitiveness. The
6 phrase "reasonable opportunity to observe" is not defined by the statute, though other
7 terms in § 1591 are defined, including "coercion," "commercial sex act," "serious
8 harm," and "venture." 18 U.S.C. § 1591(e). Likewise, there are no Circuit Court
9 cases that define "reasonable opportunity to observe." By statute or judicial
10 limitation, the term has no restraints as far as what amount of time constitutes
11 "reasonable opportunity." It could mean one day, one month, one year. Furthermore,
12 the term does not specify whether "observe" means "observe" body parts of the
13 minor, "observe day to day actions" of the minor, "observe" conduct of a minor.
14 Without any definition, the term "reasonable opportunity to observe" is without limits
15 and unconstitutionally vague, and that language must be struck from the indictment.

V.

**COUNT ONE AND 18 USC § 1591(c) IMPERMISSIBLY LESSENS THE
GOVERNMENT'S BURDEN OF PROOF IN VIOLATION OF MR.
BRAGG'S FIFTH AMENDMENT RIGHT TO DUE PROCESS**

Pursuant to 18 U.S.C. § 1591(a), the government is required to prove, beyond a reasonable doubt, that Mr. Bragg knew or was in reckless disregard of the fact that the minor had not attained the age of 18 years. However, § 1591(c) alleviates the government's burden to prove that Mr. Bragg knew the person had not attained the age of 18 years if Mr. Bragg had a "reasonable opportunity to observe" the person. Accordingly, 1591(c), an undefined statute, impermissible lowers the burden of proof for the government and eliminates an element of the offense under 1591(a). As such, 1591(c) and count one of the indictment is in violation of Mr. Bragg's Fifth Amendment right to due process.

27 This issue is often raised in the context of jury instructions. However, the same
28 fatal constitutional flaws can occur within a statute if the government's burden is

1 unconstitutional lowered as to an essential component of an offense. It is clearly
 2 established federal law, as determined by the Supreme Court, that a defendant is
 3 deprived of due process if a jury instruction “ha[s] the effect of relieving the
 4 [government] of the burden of proof enunciated in Winship on the critical question
 5 of a [defendant’s] state of mind.” Sandstrom v. Montana, 442 U.S. 510, 521 (1979);
 6 Francis v. Franklin, 471 U.S. 307, 326 (1985) (reaffirming “the rule of Sandstrom and
 7 the wellspring due process principle from which it was drawn.”); see also In re
 8 Winship, 397 U.S. 358, 364 (1970) (“the Due Process Clause protects the accused
 9 against conviction except upon proof beyond a reasonable doubt of every fact
 10 necessary to constitute the crime with which he is charged.”).

11 In Winship, the Supreme Court confronted the question of the quantum of
 12 proof necessary for the conviction of a juvenile offender in juvenile court. The Court
 13 observed that “[d]ue process commands that no man shall lose his liberty unless the
 14 Government has borne the burden of [proof] It is critical that the moral force of
 15 the criminal law not be diluted by a standard of proof that leaves people in doubt
 16 whether innocent men are being condemned.” 397 U.S. at 364 (citations omitted). The
 17 Court then held, “Lest there [be] any doubt about the constitutional stature of the
 18 reasonable-doubt standard, we explicitly hold that the due process clause protects the
 19 accused against conviction except upon proof beyond a reasonable doubt of every fact
 20 necessary to constitute the crime with which he is charged.” Id.

21 Here, § 1591(c), which eliminates the government’s burden to prove the
 22 essential element of knowledge on behalf of Mr. Bragg, is in direct conflict with the
 23 Supreme Court’s holding in Winship. Without section 1591(c), the government is
 24 required to prove that Mr. Bragg knew or was in reckless disregard of the fact that the
 25 person named in the indictment has not attained the age of 18 years. The knowledge
 26 element of an offense is one of the most important facts necessary to constitute a
 27 crime in which a person is charged. As was made clear by the Supreme Court, “the
 28 due process clause protects the accused against conviction except upon proof beyond

1 a reasonable doubt of every fact necessary to constitute the crime." Id. Section
 2 1591(c) violates Mr. Bragg's due process rights because it completely eliminates any
 3 requirement by the government to prove knowledge. As such, count one of the
 4 indictment must be dismissed.

5 **VI.**

6 **THE PREJUDICE TO MR. BRAGG FROM JOINDER OF THE TWO**
COUNTS REQUIRES SEVERANCE IN THE INTEREST OF JUSTICE
BECAUSE THE TWO COUNTS EACH HAVE THE SAME ELEMENT
THAT HAS DIFFERENT BURDENS OF PROOF

7 This Court should sever the trials for the two charges in the indictment because
 8 of the prejudice that Mr. Bragg would suffer if the offenses were tried together. Rule
 9 14 is captioned: "Relief from Prejudicial Joinder," and provides that "[i]f the joinder
 10 of offenses . . . in an indictment, an information, or a consolidation for trial appears
 11 to prejudice a defendant or the government, the court may order separate trials of
 12 counts[.]" Fed. R. Crim. P. 14(a). Severance is warranted under Rule 14 when
 13 "there is a serious risk that a joint trial would . . . prevent the jury from making a
 14 reliable judgment about guilt or innocence." United States v. Stinson, 647 F.3d
 15 1196, 1205 (9th Cir. 2011) (quoting Zafiro v. United States, 506 U.S. 534, 539
 16 (1993)).

17 The problem with joinder in this case is that each count has a different burden
 18 of proof on the same element -- knowledge of the minor's age. Proof of knowledge
 19 of the minor's age lies with the government under § 1591. The government must
 20 prove that the defendant knew or acted in reckless disregard of the minor's age. 18
 21 U.S.C. § 1591(a). As discussed in section V of these motions, the statute also states
 22 that the government may prove in the alternative that the defendant had a "reasonable
 23 opportunity to observe" the minor. 18 U.S.C. § 1591(c). Regardless of which burden
 24 of proof applies, the burden lies with the government under § 1591.

25 On the other hand, 18 U.S.C. § 2251 is silent about the knowledge requirement
 26 on the minor's age, and appear not to require knowledge. However, the Courts have
 27 held that the First Amendment requires that there be an affirmative defense to the
 28 knowledge of the minor's age. See United States v. United States District Court, 858

1 F.2d 534, 540-42 (9th Cir. 1988). The pattern jury instructions for § 2251 state that
2 "[i]t is a defense to a charge of sexual exploitation of a child that the defendant did
3 not know, and could not reasonably have learned, that the child was under 18 years
4 of age. The defendant has the burden of proving by clear and convincing evidence
5 [] that the defendant did not know and could not reasonably have learned that [name
6 of victim] was under 18 years of age." Ninth Cir. Model Crim. Jury Inst. 8.186 Sexual
7 Exploitation of a Child -- Defense of Reasonable Belief of Age, 2010.

8 It is too much to expect a jury to compartmentalize two different burdens of
9 proof, on opposing parties, for the exact same element in one trial. The jury would
10 be required to evaluate the same evidence twice, under completely different
11 standards. For Count One the jury would have to evaluate the evidence about
12 Mr. Bragg's knowledge to determine whether the government met its burden of proof
13 with respect to that element. For Count Two, the jury would have to evaluate the
14 same evidence, in consideration of the same element, but determine whether
15 Mr. Bragg had met his burden. On top of that, the jury would have to evaluate
16 whether Mr. Bragg met a lower burden of proof. There is great danger that when
17 considering the same evidence on the same element, the jury would: lower the
18 government's burden of proof to that of Mr. Bragg's burden of proof; heighten
19 Mr. Bragg's burden of proof to that of the government's burden of proof; or make a
20 finding on only one element of one count and apply that finding to the same element
21 in the other count.

22 Even if a jury could be expected to rule on the same element with two different
23 burdens of proof, there is prejudice to Mr. Bragg's ability to present a defense and his
24 constitutional rights -- particularly his right to remain silent. Raising an affirmative
25 defense essentially requires the defendant to put on evidence in a trial. Of course,
26 when challenging whether the government has met their burden of proof a defendant
27 is entitled to remain silent and not present any evidence. Trying the two counts
28 together potentially means that Mr. Bragg may have to present evidence on that

1 element in order to establish his affirmative defense for Count Two, even if he would
2 choose to remain silent and not present evidence on the same element for Count One.
3 This problem is most pronounced in the context of Mr. Bragg's decision of whether
4 or not to testify.

5 Because the government has the burden of proving (beyond a reasonable
6 doubt) knowledge of the minor's age in one charge, and the defendant has the burden
7 of showing (by clear and convincing evidence) a mistaken belief in the minor's age
8 in the other charge, the counts must be severed for trial.

9 **VII.**

10 **THIS COURT SHOULD GRANT LEAVE TO FILE FURTHER MOTIONS**

11 Mr. Bragg requests leave to file further motions if they become necessary from
12 new information.

13 **VIII.**

14 **CONCLUSION**

15 For the reasons stated, Mr. Bragg requests that this Court grant his motions.

16
17 Respectfully submitted,

18 DATED: January 18, 2013

19 *s/Bridget L. Kennedy*
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